IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TIMOTHY CROWLEY,

Plaintiff,

v.

JANEL NICKEL, TIM DOUMA, MICHAEL MEISNER, ABC FICTITIOUS COMPANY, DEF FICTITIOUS INSURANCE COMPANY, JOANNE LANE, MARY LIESURE, CAPTAIN MORGAN and JOHN DOES # 1 THROUGH # 20,

Defendants.

OPINION AND ORDER

12-cv-486-wmc

Plaintiff Timothy Crowley, currently an inmate incarcerated by the Wisconsin Department of Corrections at the Green Bay Correctional Institution, filed this proposed action pursuant to 42 U.S.C. § 1983, concerning the conditions of his previous confinement at the Columbia Correctional Institution in Portage. He has been found eligible to proceed *in forma pauperis* and made an initial, partial payment of the filing fee in this case as required by the Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915(b), requiring the court to screen his proposed complaint under the PLRA and dismiss any portion that is: (1) frivolous or malicious; (2) fails to state a claim upon which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A.

In addressing any *pro se* litigant's complaint, the court must read the allegations generously, reviewing them under "less stringent standards than formal pleadings drafted

by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For reasons set forth below, the court will grant Crowley to proceed with some, but not all, of his claims.

ALLEGATIONS OF FACT

For purposes of this order, the court accepts all well-pled allegations as true and assumes the following probative facts.

The claims in this case stem from an incident that occurred on September 10, 2011. On that occasion, Crowley was scheduled for transport from the Columbia Correctional Institution ("CCI") to the local hospital for treatment. While off site, Crowley was required to wear a REACT (Remote Electronically Activated Control Technology) shock belt on his right leg. Once activated, the REACT shock belt delivers an eight-second, 50,000-volt shock, incapacitating a prisoner for up to fifteen minutes.[1] Soon after it was placed on Crowley's leg, the belt allegedly "activated on its own . . . causing extreme pain, fear, and later some incontinence."

As a result of this incident, Crowley now seeks to sue the following defendants employed at CCI: Security Director Janel Nickel, Deputy Warden Tim Douma, Warden Michael Meisner, Administrative Captain Morgan, and Inmate Complaint Examiners Joanne Lane and Mary Leisure. In addition to these prison officials, Crowley wishes to sue the company responsible for manufacturing the REACT shock belt (ABC Fictitious Company) and that company's insurance company (DEF Fictitious Company). As for

[1] *See* Shelley A. Nieto Dahlberg, Comment, *The REACT Security Belt: Stunning Prisoners and Human Rights Groups Into Questioning Whether Its Use Is Permissible Under the United States and Texas Constitutions*, 30 ST. MARY'S L.J. 239, 247-48 (1998) (describing how the REACT shock belt works).

the latter, Crowley contends that the REACT shock belt as manufactured is faulty and "potentially life threatening." Crowley notes further that Amnesty International and the United Nations Committee Against Torture have condemned the use of the REACT shock belt.

Crowley also contends that defendants Nickel, Douma and Meisner were all aware that the REACT shock belt had malfunctioned on "at least (3) or (4) occasions." Crowley contends, therefore, that these defendants required him to wear the REACT belt in violation of the Eighth Amendment. Crowley also contends that these defendants are liable under state law for negligently requiring him to wear the defective REACT shock belt. Crowley seeks a total of $17 million in compensatory and punitive damages from the defendants.

OPINION

In order to find a defendant liable under 42 U.S.C. § 1983, a plaintiff must establish that (1) he had a constitutionally protected right, (2) he was deprived of that right in violation of the Constitution, (3) the defendant intentionally caused that deprivation and (4) the defendant acted under color of state law. *Cruz v. Safford*, 579 F.3d 840, 843 (7th Cir. 2009); *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989). Here, Crowley contends that defendants Nickel, Douma and Meisner violated the Eighth Amendment, which prohibits cruel and unusual punishment that results in the "unnecessary and wanton infliction of pain" on prisoners. *Hudson v. McMillian*, 503 U.S. 1, 5 (1992); *see also Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976).

"[A] prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Construing Crowley's complaint with an abundance of generosity, he contends that Nickel, Douma and Meisner made him wear the REACT shock belt despite having knowledge that the belt had previously malfunctioned and posed a substantial risk to his health and safety. At the screening stage of the proceeding, this is sufficient to state a claim under the Eighth Amendment.[2] Therefore, the court will grant his request for leave to proceed with Eighth Amendment claims against Nickel, Douma and Meisner.[3]

In addition to his Eighth Amendment claims, Crowley asks the court to exercise supplemental jurisdiction over state law claims for negligence and products liability. In that regard, Crowley contends that ABC Fictitious Company is liable for manufacturing the defective REACT stun belt that caused him injury and that defendants Nickel,

---

[2] Although Crowley's allegations pass muster under the court's lower standard for screening, in order to be successful on this claim on the merits, he will have to present *admissible* evidence permitting a reasonable trier of fact to conclude that defendants acted with deliberate indifference to a substantial risk of serious harm. This is a high standard. Inadvertent error, negligence or even gross negligence are all insufficient grounds to invoke the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996).

[3] Crowley does not allege facts establishing that any other individual defendant was personally involved in the incident which forms the basis of his complaint. It is well established that liability under § 1983 must be based on a defendant's personal involvement in a constitutional violation. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995). Accordingly, Crowley's request for leave to proceed against Captain Morgan, Lane, Leisure and John Does # 1 through # 20 will be denied. Crowley may amend his complaint with respect to these parties, provided that he includes facts illustrating how each defendant was personally involved in the complained of incident.

Douma and Meisner were negligent in requiring him to wear it. To the extent that these claims arise out of the same set of facts as plaintiff's federal claim, the court may exercise supplemental jurisdiction over them as well. 28 U.S.C. § 1367. The court will not grant Crowley's request for leave to proceed with these claims, however, because the complaint lacks sufficient factual allegations to be viable.

Regarding Crowley's claim of negligence, Wisconsin Statutes require a claimant bringing a civil action against a state officer or employee to serve written notice of the claim on the Wisconsin Attorney General within 120 days of the events giving rise to the claim. Wis. Stat. § 893.82(3). The written notice must include the time, date and circumstances of the event causing the injury or damage for which the claimant seeks relief, as well as the names of the state officials involved. *Id*. When a plaintiff fails to comply with the notice of claim statute, this court lacks jurisdiction to hear his claim. *Saldivar v. Cadena*, 622 F. Supp. 949, 959 (W.D. Wis. 1985) (noting that Wis. Stat. § 893.82 "imposes a condition precedent to the right to maintain an action").

Here, Crowley has not averred that he gave notice to the Wisconsin Attorney General. Much less notice within the time allowed. Because Crowley has not satisfied this notice requirement, the court must dismiss his state law negligence claim without prejudice. Crowley may file an amended complaint on this issue, provided that he includes proof that he timely notified the Wisconsin Attorney General of his claim in accordance with Wis. Stat. § 893.82(3).

Regarding Crowley's claim of product liability, he fails to allege the identity of the defendant responsible for manufacturing the product at issue or its insurer. Because

Crowley has not or cannot provide the information necessary to identify these putative defendants, the Marshal obviously can neither serve them with process, nor can this court acquire personal jurisdiction over them. "[I]t is pointless to include lists of anonymous defendants in federal court; this type of placeholder does not open the door to relation back under Fed. R. Civ. P. 15, nor can it otherwise help the plaintiff." *Wudtke v. Davel*, 128 F.3d 1057, 1060 (7th Cir. 1997) (citations omitted). Accordingly, the court will dismiss the product liability claims against the unknown manufacturer (ABC Fictitious Company) and its insurance company (DEF Fictitious Insurance Company) without prejudice. If Crowley can identify those defendants later, he may move to add them as defendants, understanding that he will face the hurdle of establishing that the facts of these claims are sufficiently related to the other claims in the case as to merit this court's exercise of supplemental jurisdiction.

ORDER

IT IS ORDERED that:

1. Plaintiff Timothy Crowley's request for leave to proceed is GRANTED in part with respect to his Eighth Amendment claims against Janel Nickel, Tim Douma and Michael Meisner. Crowley's request for leave to proceed against the remaining defendants is DENIED and his remaining claims are DISMISSED without prejudice.

2. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendants Nickel, Douma and Meisner. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants

3. For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

4. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 9th day of September, 2014.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge